

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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FRANCISCO VIDAL; MARTIN NARES;
DOE INMATES I THROUGH X,

Case No. 2:19-CV-01688-JCM-EJY

Plaintiff,

ORDER

V.

STEVE SISOLAK; JAMES DZUREND; BRIAN E. WILLIAMS; MIGUEL FORERO SPECIALIST; BRYAN G. M.D.; NURSE DOES I THORUGH X,

Defendants.

12 Before the Court is Plaintiff Francisco Vidal's Emergency Motion for Injunctive Relief
13 appearing on a Civil Rights Complaint form. ECF No 1-1. Plaintiff's Motion/Complaint is not
14 accompanied by a request to proceed *in forma pauperis* and Plaintiff has not paid the filing fee
15 necessary to initiate a case. For this reason alone, Plaintiff's Motion/Complaint need not be
16 considered by the Court. Ordinarily, Plaintiff must either submit a completed *in forma pauperis*
17 application or pay the filing fee before the Court ordinarily screens the complaint under 28 U.S.C.
18 § 1915(e)(2).

19 Despite the failure to complete an *in forma pauperis* application or pay the filing fee, the
20 Court screens Plaintiff's filing.

I. Screening Procedure

22 When screening a prisoner complaint, a court must identify cognizable claims and dismiss
23 claims that are frivolous, malicious, fail to state a claim on which relief may be granted, or seek
24 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).
25 Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state
26 a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112
27 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain sufficient factual matter,
28 accepted as true, to state a claim of relief that is plausible on its face.” *See Ashcroft v. Iqbal*, 556

1 U.S. 662, 678 (2009). The court liberally construes pro se complaints and may only dismiss them
2 “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which
3 would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *Iqbal*,
4 556 U.S. at 678).

5 When considering whether Plaintiff’s Complaint/Motion is sufficient to state a claim, all
6 allegations of material fact are taken as true and construed in the light most favorable to the plaintiff.
7 *Wyler Summit P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
8 Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
9 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
10 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it
11 is clear the complaint’s deficiencies could not be cured through amendment, a *pro se* plaintiff should
12 be given leave to amend the complaint with notice regarding the complaint’s deficiencies. *Cato v.*
13 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995). Here, Plaintiff lacks standing to bring the first
14 claim for relief he has filed.

15 **II. Plaintiff’s Complaint/Motion**

16 A. Plaintiff’s First Claim for Relief

17 Plaintiff’s first claim for relief is asserted on behalf of another prisoner who Plaintiff
18 identifies as Martin Nares. In order for Plaintiff to state a claim for injunctive relief on behalf of
19 another, Plaintiff must establish what is known as third-party standing (the right to bring the claim
20 to court on behalf of another).

21 To satisfy the standing requirements of Article III, a party seeking a declaratory judgment
22 “must allege facts from which it appears there is a substantial likelihood that he will suffer injury in
23 the future.” *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) (citing *City of Los Angeles v. Lyons*,
24 461 U.S. 95, 102–03 (1983)). In Plaintiff’s first cause of action, he cites no injury to himself and
25 makes no claim that there is a substantial likelihood that he will suffer injury in the future. Thus,
26 Plaintiff does not have standing to bring this claim.

27 To establish third party standing to bring his first claim for relief, Plaintiff would have to
28 establish, at a minimum, (1) a close relationship to the third party, and (2) some genuine obstacle

1 preventing the third party from asserting their own rights. *Singleton v. Wuff*, 428 U.S. 106, 114-15
2 (1976); *Innovation Review Lab v. Nielsen*, 310 F.Supp. 1150, 1161 (D. Or. 2018). Here, even if
3 there were a basis to consider third party standing, Plaintiff alleges no relationship between himself
4 and Mr. Nares other than they are both prisoners in the same facility. Plaintiff also does not explain
5 why Mr. Nares cannot bring a claim on his own behalf. For these reasons, Plaintiff's first cause of
6 action fails as stated.¹

7 B. Plaintiff's Second Claim for Relief

8 Plaintiff's second claim for relief is sought on his own behalf and alleges the denial of
9 medical care for a lump in his groin. Plaintiff claims not only did he not receive adequate medical
10 care, but there was deliberate indifference to his medical need. Plaintiff also asserts medical
11 malpractice and negligence. Before discussing the substance of Plaintiff's claim, the Court notes
12 that Plaintiff sues every defendant in his/her official and individual capacity. State officials sued in
13 their official capacity are not persons under section 1983 unless they are sued for prospective
14 injunctive relief. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n. 10 (1989).

15 In Plaintiff's second claim for relief he only identifies defendants Dr. Bryan and Dr.
16 Manalang, and further states that he has been putting in medical kites that have been ignored.
17 Plaintiff asks the Court to compel "them" to follow through with specific medical procedures he
18 discussed with each of these two defendants (a CT scan and ultrasound of a growth in his groin area).
19 Plaintiff asks for no other relief or damages.

20 With respect to all defendants other than Drs. Bryan and Manalang, Plaintiff's second claim
21 for relief fails to identify how, if at all, any individual named or unnamed was in any capacity
22 involved with his alleged failure to receive medical care. Reading the Complaint liberally, and
23 construing the allegations as creating liability based on supervisory capacity, Plaintiff's claims fails
24 against all defendants except Drs. Bryan and Manalang.

25 A defendant may be held liable in a supervisory capacity under Section 1983 "if there exists
26 either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal

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28¹ The Defendant Miguel Forero is identified in Plaintiff's first claim for relief only. Given that the first claim
will be dismissed as pled, claims against Mr. Forero will also be dismissed.

1 connection between the supervisor's wrongful conduct and the constitutional violation." *Hansen v.*
2 *Black*, 885 F.2d 642, 646 (9th Cir.1989). "[A] plaintiff must show the supervisor breached a duty
3 to plaintiff which was the proximate cause of the injury. The law clearly allows actions against
4 supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff
5 was deprived under color of law of a federally secured right." *Johnson v. Duffy*, 588 F.2d 740, 743-
6 44 (9th Cir. 1978). "The requisite causal connection can be established ... by setting in motion a
7 series of acts by others," *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (citation omitted), or by
8 "knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or
9 reasonably should have known would cause others to inflict a constitutional injury," *Dubner v. City*
10 & *Cnty. of San Francisco*, 266 F.3d 959, 968 (9th Cir. 2001) (citations omitted). "A supervisor can
11 be liable in his individual capacity for his own culpable action or inaction in the training, supervision,
12 or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct
13 that showed a reckless or callous indifference to the rights of others." *Watkins v. City of Oakland*,
14 145 F.3d 1087, 1093 (9th Cir.1998) (internal alteration and quotation marks omitted). Here, Plaintiff
15 alleges no facts that support a finding that any of the defendants named (other than Drs. Bryan and
16 Manalang) are culpable, acquiesced in the constitutional deprivation claims or showed reckless or
17 callous disregard for Plaintiff. Hence, as stated all claims against individuals other than Dr. Bryan
18 and Dr. Manalang are dismissed to the extent liability is sought based on their supervisory capacity.

19 With respect to Drs. Bryan and Manalang, they *may* be liable as state officials if they acted
20 with deliberate indifference and were subjectively aware of, but purposefully ignored or failed to
21 respond to, an "excessive risk to inmate health" (i.e., a serious medical need). *Colwell v. Bannister*,
22 763 F.3d 1060, 1066 (9th Cir. 2014) (citations omitted). A defendant's alleged indifference must be
23 "substantial." *Estelle*, 429 U.S. at 105-06; *Lemire v. California Department of Corrections and*
24 *Rehabilitation*, 726 F.3d 1062, 1081-82 (9th Cir. 2013) (citations omitted). A prison doctor's
25 mistake, negligence, or malpractice does not establish deliberate indifference to serious medical
26 needs. *Estelle*, 429 U.S. at 105-06. "Even gross negligence is insufficient" *Lemire*, 726 F.3d at
27 1082 (citation omitted). "[T]he official must both be aware of facts from which the inference could

1 be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Colwell*,
2 763 F.3d at 1066 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)) (quotation marks omitted).

3 A prisoner need not prove that he was completely denied medical care. *Lopez v. Smith*, 203
4 F.3d 1122, 1132 (9th Cir. 2000) (en banc). Rather, deliberate indifference may be “manifested by
5 prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying
6 or delaying access to medical care or intentionally interfering with the treatment once prescribed.”
7 *Estelle*, 429 U.S. at 104-05 (footnotes omitted). The medical care a defendant provided to an inmate
8 amounts to deliberate indifference only if the doctor chose a course of treatment that “was medically
9 unacceptable under the circumstances” and did so “in conscious disregard of an excessive risk to
10 plaintiff’s health.” *Colwell*, 763 F.3d at 1068 (citations and internal quotation marks omitted).

11 Plaintiff’s second claim for relief seeks prospective injunctive relief for alleged deliberate
12 indifference to his medical needs. This states a facially viable claim for relief. Although Plaintiff
13 does not state when he was seen by Dr. Manalang, the face of his Complaint states the alleged
14 violation occurred on July 28, 2019. The substance of the Complaint shows that this is when Plaintiff
15 alleges he first discovered that Dr. Manalang had not placed an order for follow up medical tests on
16 a lump in Plaintiff’s groin that may be cancer. This is also when Plaintiff alleges Dr. Bryan refused
17 to properly examine Plaintiff and refused to place any orders for Plaintiff despite reading the record
18 showing that Dr. Manalang found something of concern and was going to place an order for a CT
19 scan and ultrasound, but never did. Plaintiff states that Dr. Bryan refused stating: “No. I’m not
20 going to do his job.” Plaintiff states he pleaded with Dr. Bryan, but all Dr. Bryan did was tell him
21 to monitor the lump. The totality of the facts are sufficient to state a timely, facial claim that Drs.
22 Bryan and Manalang purposefully ignored and failed to respond to Plaintiff’s “excessive risk” to his
23 health.

24 **ORDER**

25 Accordingly,

26 IT IS HEREBY ORDERED that the Clerk of the Court WILL SEND Plaintiff the approved
27 form application to proceed *in forma pauperis* by a prisoner, as well as the document entitled
28 information and instructions for filing an *in forma pauperis* application.

1 IT IS FURTHER ORDERED that within thirty (30) days from the date of this Order, Plaintiff
2 will either: (1) file a fully complete application to proceed *in forma pauperis*, on the correct form
3 with complete financial attachments in compliance with 28 U.S.C. § 1915(a); or (2) pay the full \$400
4 fee for filing a civil action (which includes the \$350 filing fee and the \$50 administrative fee).

5 IT IS FURTHER ORDERED that if Plaintiff does not timely comply with this Order,
6 Plaintiff's entire action may be subject to dismissal.

7 IT IS FURTHER ORDERED that, as stated, Plaintiff's current Motion/Complaint (ECF No.
8 1-1) fails to state claims against any named defendant except Dr. Bryan and Dr. Manalang. If not
9 amended all claims asserted against defendants other than Dr. Bryan and Dr. Manalang are subject
10 to dismissal for the reasons stated above.

11 IT IS FURTHER ORDERED that the Clerk of the Court will retain the complaint (ECF No.
12 1-1) but will not file it at this time.

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14 DATED: October 10, 2019

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ELAYNA J. YOUCRAH
UNITED STATES MAGISTRATE JUDGE